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CASE NO. 94-439

THE SUPREME COURT
OF THE
UNITED STATES

OCTOBER TERM, 1994

LAWRENCE MOORE,

PETITIONER,

v.

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS LOCAL 569; PAUL BLACKWOOD; THOMAS PRIDEMORE; JAMES WESTFALL; JOE HEISLER; DICK SMITH; TERRY GODSHALK, et al; INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS; J.J. BARRY; S.R. McCANN; RICHARD ROBBINS; ATKINSON MECHANICAL, INC.; FISCHBACH & MOORE, INC.,

RESPONDENTS.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF OF PETITIONER

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I. The Court should grant the Petition to resolve whether Atkinson and the Unions could collude against third party beneficiaries in negotiation and administration of a collective bargaining agreement and throughout proceedings in the district court, and to review the district court's refusal to permit discovery in this case and limit cross-examination of the only Atkinson and Union witness at trial, to review district court refusal to permit any rebuttal case, and to review the Court of Appeals' refusal to address those issues.

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STATEMENT OF JURISDICTION.

Jurisdiction was proper in the district court under 28 U.S.C. §§ 1331, 1337, and 1343. Appellate jurisdiction was proper under 28 U.S.C. § 1291. This Court has jurisdiction to hear this matter pursuant to 29 U.S.C. § 1254 (1) and Rule 10 of the Supreme Court Rules.

MISSTATEMENTS OF FACT IN OPPOSITION

Respondent Atkinson Mechanical Contractors Company (hereinafter "Atkinson") ostensibly set forth material facts, but did so by eight pages of misstatements which cited to the record in the district court. No other parties opposed the Petition. Plaintiff uses Atkinson's citing methods to point out and address misstatements as briefly as possible below.1/

Defendants' Project Agreement specifically incorporated the job referral procedure which is created by the Inside collective bargaining

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1/. Defendant's attorneys have the distinction of presently being the most often-sanctioned law firm in the Ninth Circuit.

Agreement between Local 569 and other signatory electrical contractors and authorizes Local 569 to administer the hiring hall job referrals.2/

The referral procedure preamble stated:

> In the interest of maintaining an efficient system of production in the industry, providing for an orderly procedure of referral of applicants for employment, preserving the legitimate interests of the employees in their employment status within the area and of eliminating discrimination in employment because of membership or non-membership in the Union, the parties hereto agree to the following system of referral of applicants for employment.

Atkinson superintendent Wells, who rejected Plaintiff's referral in response to its request for an electrician, didn't reject the Plaintiff because he was litigious or disruptive or ever

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2/. The Project Agreement (at CD 267) stated, "The Employer . . . shall . . . be bound by the registration facilities and referral systems established by the unions signatory hereto . . .." Plaintiff's reply brief on appeal cited to the district court's trial ruling that Atkinson was bound by the Inside Agreement procedure and ruled Atkinson's contrary argument, raised here again frivolously, "was wrong," and held it had breached its "lawful duty" by not participating in the referral procedure oversight committee hearings (see the transcript of the trial on August 16, 1991 (Volume XV), at pp. 28-41).

use those terms (used only to beg the question the collective bargaining agreement ("CBA") was not violated by denying its benefits to a third party beneficiary Plaintiff). Atkinson's Brief stated its Project Manager and Company attorney both advised Wells he could reject Petitioner's referral with or without cause.

Whether Plaintiff was litigious, if proved, could be remedied at law and *ad hominem* attacks that he was motivated "solely by self-interest" illustrate that Defendants had no real defense.

Atkinson attempted to create the illusion that Superintendent Wells was a normal part of its management team and had his own management reasons for rejecting Plaintiff, but the record is clear that Wells was recommended to Atkinson by Local 569's business manager Dick Smith, and sympathized with ostracizing Plaintiff for his political and legal opposition to the Union's officers. Atkinson fired Wells shortly after.

After Wells showed hostility at trial while being questioned on his inconsistent deposition statements (angrily admitting he intended "to

knock [Plaintiff] on his butt") the trial judge interrupted cross-examination and also refused to permit Plaintiff to bring on any rebuttal of Wells' thoroughly unreliable testimony.3/

Defendant's claims of Wells' confidence in its right to reject Plaintiff is belied by the attempts to justify Wells' breach of contract.

Nor is the fact that Wells confirmed his right to reject Plaintiff with the "Project Manager" and the "Company attorney" dispositive of whether Atkinson had such a right under the collective bargaining agreement to collude via its servant Wells with the Union Defendants to blacklist Plaintiff because he sued them.

Defendant also stated that the decision to reject Plaintiff was not made in collusion with

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3/. Defendant attempted to downplay the trial judge's stoppage of cross-examination on Wells' deposition statements after frustration caused him to admit he intended "to knock [Plaintiff] on his butt," and misrepresented the statement was "an excerpt from his deposition testimony."

But that trial testimony was clearly cited on appeal (transcript of July 31, 1993, Volume IX, pp. 136-162 -- where Wells had also defined a troublemaker as a person who sues the union). Further, Wells' deposition testimony admitted he also threatened "to take [Plaintiff] out."

the union because Wells called Smith and White and told them he was going to reject Plaintiff. But that is also not true. Wells testified at his Deposition that after Smith informed him of Plaintiff's referral to the Atkinson job,

> "I didn't say much of anything. I hung up the phone; I thought about it; discussed it with my foremen; I went to [the Project Manager] and asked him if I could make the turn around, and he says, yes."

He stated that when he called Smith later and told him he would reject Plaintiff, he was reassured it was his "prerogative." (Atkinson SER at 252-259; Wells Dep. at 20-27).4/

White denied that Wells ever called him or that he even knew Plaintiff had been rejected,

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4/. The jury awarded damages to Plaintiff for Smith's other abuses of his Union office to ensure Plaintiff could not work by removing him from the out of work list and also derogating his employment status from out-of-list priority Group One to Group Two (*Supp. Appendix* at 114).

Smith was formerly a high-level supervisor with defense contractor Fischbach & Moore, Inc. which evaded Federal debarments by racketeering with Local 569 and Internat'l IBEW officers to defraud the Government of hundreds of millions of dollars by transferring employees to puppet corporations. Wells was also a transferee and Smith later recommended him to Atkinson for the superintendent position.

testified he knew Plaintiff for twenty years, and Plaintiff was a foreman and lead hand who always did a good job (trial transcript on August 14, 1991, Volume XIII, pp. 116, 126).

Atkinson superintendent Wells' deposition statements that he knew Plaintiff for five or ten years as a "troublemaker" and discussed him with two foremen (who denied those discussions) to decide that he would "disrupt his crew" were controverted by Plaintiff's two declarations in opposition to a summary judgment motion, one of which was an F.R.Civ.P. 56(f) declaration (CD 284-285, 301) that discovery was not complete.

The issues of fact created by declarations and Wells' Deposition should have been resolved by the jury, but summary judgment was granted to Atkinson before discovery was completed and while a motion to compel discovery was pending.

Defendant also misrepresented that Smith's recommendation of Wells as superintendent for Atkinson "is immaterial" to the claim that it breached the collective bargaining agreement, but Local 569 officer Smith's breach of duty of

fair representation by an unfair labor practice (collusion with Atkinson superintendent Wells to reject Plaintiff from employment) makes a case against Atkinson for breach of contract.

Atkinson stated Petitioner misrepresented Wells' relationship with the Union Defendants. But Wells testified in his Deposition he had talked to people named in the caption of the case about Plaintiff on "various occasions" and none of them were "too fond of" the Plaintiff, specifically naming Smith. (Atkinson SER at 276, 280; Wells Depo. at 44:19 -25, 48:9-22).

Wells' deposition was also replete with his statements of resentment at Plaintiff's running for Union office ("he's a glory seeker"), and passing out papers at election time (Atkinson SER 277-79; Wells Depo. at 45-47).

Wells stated Plaintiff was turned around with "no reason," but told another electrician at the deposition he should not associate with Plaintiff if he wanted to benefit from being a Union member and have jobs, because he is suing the people that provide the jobs. (Atkinson SER

at 265, 278-79, 303; Wells Depo 33, 46-47, 71).

Contrary to Atkinson's misstatements in its Reasons Why the Petition Should be Denied (and after its eight pages of misstatements of fact) that this court cannot undertake to review the findings of fact of the "two courts below," the two courts made absolutely no findings of fact. The Ninth Circuit gratuitously stated Plaintiff is litigious and disruptive to beg the question Atkinson was allowed to reject, provided it did not do so on the basis of his "union activity." (*Supplemental Appendix* to *Petition for Writ of Certiorari*, at pp. 3, 125-26).

Nor did the Ninth Circuit comment on the district court's abuse of Plaintiff's right to cross-examine Wells on his testimony, or on its refusal to permit Plaintiff to do any rebuttal case to Wells' trial testimony for Local 569.5/

5/. The Ninth Circuit also ignored Plaintiff's appeal on grounds that Atkinson conspired with Local 569 to interfere with his protected right to sue the Union, and would not acknowledge his appeal on grounds the district court would not permit him to fully cross-examine Wells or to present a case on rebuttal that contradicted Wells' entire testimony on Local 569's behalf.

MISSTATEMENTS OF LAW IN OPPOSITION

Contrary to Atkinson's misstatement of law, "express language of the Project Agreement" may not allow "an employer to reject an employee on nondiscriminatory grounds" where that employer has breached the contract by helping the Union to breach its duty of fair representation. To hold otherwise would fly in the face of public policy and legitimize such CBAs as contracts of adhesion for employees.

Clearly, Atkinson hired Wells and approved Plaintiff's rejection to strengthen congenial relations with the Union, to persuade it of its good will, and assist the Union in disciplining him for suing it and opposing Union policies. (*Petition for Writ of Certiorari*, pp. 42-49).

"Commingling" of facts in this hybrid 301 cause of action does not obscure the question, but illuminates the awful history of Union and employer collusion to violate the CBA rights of third party beneficiaries. N.L.R.B. decisions were cited to show the history and true purpose of CBA hiring hall provisions approved by this

Court, including a "right to reject" to counter Union favoritism, and show decisions that abuse of CBAs shown here may be remedied at law.

Plaintiff does not base his claim of breach of the CBA against Atkinson on its unfair labor practice. Atkinson was sued for breach of the CBA contract, and Union abuse of the CBA right to reject to discipline dissident members is a breach of its fair representation duty (such a breach necessarily required Atkinson to comply with rejection and breach the contract).

ARGUMENT

Atkinson, the International Brotherhood of Electrical Workers and Local 569 entered into a collusive arrangement from the start of their relationship to pretend to bargain collectively on behalf of third party beneficiaries.6/

Atkinson hired superintendent Wells on the

6/. The contract was negotiated by a "Building and Construction Trades Council" which was not an exclusive representative chosen by any Union bargaining unit (see *Supp. Appendix*, at pp. 26-27, n.3) and both the IBEW and Local 569 signed it without any approval by the bargaining unit.

recommendation of Local 569's business manager Smith, not for any legitimate business reason, but to ensure that Smith could manipulate and control, to their mutual advantage, bargaining unit members. Those three colluded to deny the third party beneficiary Plaintiff the benefits of the contract ostensibly negotiated for him.

Unfortunately, after Plaintiff was rejected Atkinson realized Wells was a loose cannon and that Smith had used Atkinson to illegally deny Plaintiff income he needed to support his legal and political opposition to Union policies, but that does not excuse its breach of contract.7/

The rejection retaliated against Plaintiff for exercising protected rights to sue, and the Union is also liable under LMRDA § 101(a)(4), and Atkinson is liable for tortious, collusive conduct. *Duncan v. Peninsula Shipbuilders*

7/. Smith colluded with Atkinson servant Wells to reject Plaintiff in violation of his duty to fairly represent Plaintiff, by breaching both the Union's constitution and referral procedure (see *Wooddell v. IBEW Local No. 71*, 112 S.Ct. 494 (1991)), and by violating Sec. 101(a)(4) of the Labor Management Reporting and Disclosure Act (29 U.S.C. 411).

Ass'n, 394 F.2d 237 (4th Cir. 1968).

It is obvious that Plaintiff is a victim of collusion between Atkinson and the Unions, not only to deny him the benefits of an ostensible collective bargaining agreement, but to abuse the misguided attempts of the courts to create a "national labor policy" which does not permit third party beneficiaries of CBAs to check and balance colluding parties effectively, and to create an even more nebulous "industrial peace" which flies in the face of Congessional stated intent to protect the rights of workers to the extent that ordinary citizens are protected.

District court refusal to permit the cross-examination of Atkinson servant Wells, refusal to permit rebuttal of Wells' testimony, and its prejudicial jury instructions, and the Circuit Court's ratification of those acts, beg for the exercise of this Court's supervision power.

This Petition for Writ of Certiorari should be granted.

Dated: 10-20-1994 Lawrence Moore

Lawrence Moore